MOTION FILED

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No. 01-1375

(4)

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* PEABODY COAL COMPANY, PEABODY WESTERN COAL COMPANY, AND PEABODY HOLDING COMPANY, INC., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Statement of Facts

Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Company, Inc. (collectively "Peabody"), by counsel and pursuant to Rule 37.3(b), hereby file their Motion for Leave to File *Amicus Curiae* Brief in this case. In support of their motion, amici make the following showing:

Pursuant to Rule 37(a), by letter dated August 1, 2002, amici sought written consent from Counsel of Record for Petitioner and Respondent. Petitioner's counsel granted written consent.

Respondent's counsel gave consent based upon two conditions: (1) that the amicus be filed timely; and (2) that the amicus brief "not rely on documents that are not in the record," and in particular not rely upon a memorandum dated August 9, 1984 authored by the Manager of the Navajo Nation's Minerals Department.

Peabody's brief is being filed timely. In addition, the amicus brief does not cite or rely upon the August 9, 1984 Navajo Nation memorandum. Because of the conditional nature of the Respondent's consent, and out of an abundance of caution, Peabody is seeking leave to file its amicus brief.

Nature of Peabody's Interest

The Peabody amici have an important interest in this case because Peabody Western Coal Company mines coal on the Navajo Nation reservation. In this action, the Navajo Nation asserts a claim relating to the renegotiation

and amendment of one of the leases under which Peabody operates. Accordingly, the outcome of this case will have a direct impact on Peabody.

Moreover, the Navajo Nation has filed a separate lawsuit against Peabody in the United States District Court for the District of Columbia alleging that the Peabody defendants improperly influenced the federal government's decisions regarding the coal leases at issue in this case. *See Navajo Nation v. Peabody Holding Co.*, Civil Action No. 99-469 (EGS) (D.D.C.). The Navajo Nation has asserted claims against Peabody for breach of contract, aiding and abetting a breach of trust, conspiracy, and fraudulent concealment, as well as claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*

Peabody respectfully submits that its Motion for Leave to File *Amicus Curiae* Brief should be granted.

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QUESTION PRESENTED

Whether the court of appeals properly held that the Navajo Nation could assert a claim for breach of fiduciary duty in connection with the Interior Secretary's actions concerning an Indian coal lease, without finding a violation of any specific statutory or regulatory duty established pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. § 396a *et seq.*

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STATEMENT OF INTEREST

Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Company, Inc. (collectively "Peabody"), respectfully submit this brief amici curiae in support of petitioner.[1] Amici have an important interest in this case because Peabody Western Coal Company mines coal on the Navajo Nation reservation. In this action, the Navajo Nation asserts a claim relating to the renegotiation and amendment of one of the leases under which Peabody operates. Accordingly, the outcome of this case will have a direct impact on Peabody.

Moreover, the Navajo Nation has filed a separate lawsuit against Peabody in the United States District Court for the District of Columbia alleging that the Peabody defendants improperly influenced the federal government's decisions regarding the coal leases at issue in this case. *See Navajo Nation v. Peabody Holding Co.*, Civil Action No. 99-469 (EGS) (D.D.C.). The Navajo Nation has asserted claims against Peabody for breach of contract, aiding and abetting a breach of trust, conspiracy, and fraudulent concealment, as well as claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*.

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[1] Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part. No person or entity, other than amici curiae, made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' positions on the issue of their consent to the filing of this brief have been submitted to the Clerk. By letter, the Navajo Nation has withheld consent if the amicus brief relies upon matters not of record, and specifically objects to reliance upon a memorandum dated August 9, 1984 from the Navajo Nation Minerals Director. Peabody's amicus brief does not rely upon this memorandum. Nonetheless, in an abundance of caution, Peabody has filed a motion for leave to file its amicus brief.

STATEMENT OF THE CASE

The Navajo Nation's claims are defective because they fail to identify any violation of a specific statutory or regulatory duty. The uncontradicted record demonstrates, as a matter of law, that Peabody did not seek improperly to influence the Interior Department; that there was never any final administrative decision by the Interior Department Peabody allegedly "scuttled"; and that the government did not improperly "rubber stamp" the lease amendments. (Respondent's Opposition to Cert. Petition, at 9). It is clear, as a matter of law, that the Navajo Nation could not possibly have been injured by any of the alleged misconduct. The 1987 lease amendments negotiated by Peabody and the Navajo Nation provided the Navajo Nation with a royalty rate of 12.5%, which was as high as any of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states between 1985 and 1996, and with a host of additional benefits (such as increased payments for water use and recognition of Navajo Nation taxation on coal).[2] In fact, in 1998 and 1999 the Navajo Nation told the Interior Department that the 12.5% rate was in the "best interest" of the Navajo Nation, and otherwise satisfied the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a ("IMLA"), and its implementing regulations, 25 C.F.R. § 211.43.

A. Peabody Makes Substantial Investments Benefitting the Navajo Nation.

In the 1960s, Peabody discovered large reserves of coal on the Navajo Nation reservation under coal

[2] Peabody has lodged with this Court excerpts from a summary of public records compiled by an expert describing the royalty rates on each of the 471 Western federal, state, and tribal coal leases from 1988 to 1996, and those dating back to 1985. [L001-03]

exploration permits.[3] Peabody then entered into two leases with the Navajo Nation to mine coal in Arizona on the Navajo Nation reservation. Under these two leases, the North Lease (Lease No. 8580) and the South Lease (Lease No. 9910),[4] Peabody is required to pay the Navajo Nation coal royalties.

Because the Navajo Nation's coal was located very far from any significant market, successful and profitable development of the coal required mastering unique and expensive transportation obstacles. The high cost of transportation made development of the coal uneconomic. These obstacles were overcome by construction of a 90-mile dedicated railroad and a 273-mile coal slurry pipeline – the longest coal slurry pipeline in the world. [JA 352-53] Peabody created valuable markets for Navajo coal by entering into coal supply agreements with utility companies that, in reliance thereon, constructed two large power generating facilities (the Navajo and Mohave Generating Stations) near or on the reservation to be fueled exclusively by Navajo coal.[5] In the years following execution of the leases, Peabody brought the benefits of a first class coal mining operation and many jobs to the Navajo Nation. [JA 352]

The original North Lease provided that its royalty rate was subject to adjustment twenty years after its effective date, that is, on February 1, 1984. The original South Lease contained no royalty rate reopener provision. The reopener in the original North Lease indicated that

[3] The exploration permits and original leases were executed by a predecessor Peabody company known as Sentry Royalty Company.

[4] The South Lease involves coal that the Navajo Nation jointly owns with the Hopi Tribe.

[5] The parties agreed below that "The [North] Lease was and is one important part of a larger initiative to provide electricity and water to the American Southwest by the United States Bureau of Reclamation and the owners of the Mohave and NGS plants. . . ." Consolidated Statement of Proposed Uncontroverted Facts, at 1.

the parties could negotiate a royalty rate adjustment, or, failing that, the Interior Secretary could make a "reasonable adjustment" by February 1, 1984.

In 1979, Peabody initiated efforts to negotiate an increase in the royalty rates under the North and South Leases, even though no reopener was required under the South Lease, and the North Lease reopener was not available for another five years. Peabody proposed changing the royalty rate from a volume-based rate to one based upon a percentage of gross revenues. This change would enable the Navajo Nation to share directly in a rising coal price. Peabody also proposed that the commercially prevailing royalty rate of 12.5% be used.[6] From 1979 to 1984, various Navajo Nation representatives concurred with this rate. Completing negotiations proved difficult, however, because of changing Navajo Nation administrations. A substantial part of these negotiations related to matters other than the royalty rate on the North Lease, including: increased payments for water use; recognition of Navajo Nation taxation on coal; and increasing the royalty rate on the South Lease which did not provide for any royalty rate reopener.

[6] In 1976, Congress established 12.5% as the "minimum" royalty rate for federal coal in the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. § 207(a). While characterized as a "minimum" federal rate by Congress, this was in fact the highest rate at the time, with the average rate at the time only approaching 8%. *See, e.g.* H.R. Rep. No. 94-681, at 57-58 (1975) ("The Department of Interior reports that 12.5% is the current ceiling on coal leases."), *reprinted in* 1976 U.S.C.C.A.N. 1943, (1981). The Interior Secretary opposed passage of such a rate "at or near the historic high." See 122 Cong. Rec. 19, 379-80 (1976). To prevent federal coal from becoming uneconomical because of the 12.5% rate, however, the Interior Department was authorized to reduce the rate, and it has issued regulations governing reductions from the 12.5% rate. 30 U.S.C. § 209; 43 C.F.R. § 3485.2(c).

B. The Navajo Nation Unilaterally Procures a Royalty Rate Adjustment for the North Lease in 1984.

The twenty year anniversary of the North Lease expired on February 1, 1984. Later in the spring of 1984, the Navajo Nation nonetheless initiated a unilateral effort to obtain a royalty rate adjustment on the North Lease from the Interior Secretary. In a March 26, 1984 letter sent privately to Interior Secretary Clark, the Navajo Nation Chairman requested that the Secretary make a reasonable royalty rate adjustment on the North Lease to a minimum of 12.5%. The Navajo Chairman also asked the Secretary for his assistance in obtaining a "voluntary adjustment" of the royalty rate on the South Lease. Navajo Nation Statement of Genuine Issues, at ¶ 25. The Navajo Nation did not send Peabody a contemporaneous copy of this letter.

In April 1984, the Navajo Nation Chairman sent two private letters seeking a royalty rate adjustment directly to Area Director Donald Dodge of the Bureau of Indian Affairs ("BIA"), whose office is located in Window Rock, Arizona, in a building adjoining that of the Navajo Nation Chairman. Mr. Dodge was a member of the Navajo Nation and a political supporter of the Navajo Nation Chairman. With these letters to Area Director Dodge, the Navajo Chairman submitted two studies purportedly justifying a royalty rate increase in excess of 12.5%. As with his prior correspondence to Secretary Clark, the Navajo Nation Chairman did not send Peabody a copy of this letter or its enclosures.

On June 18, 1984, BIA Area Director Dodge signed a document that purported to contain his conclusion that a 20% royalty rate was appropriate for the North Lease. Notice of this decision was sent to Peabody and to the Navajo Nation Chairman. The Area Director's cover letter to the Navajo Nation Chairman reveals that the adjustment was made "in consultation with the Navajo Nation's Minerals Department and Department of Justice." In addition, the Area Director's cover letter mentions that it

had completed legal research on the "effective date" of the North Lease, and that it was effective on August 28, 1964. The parallel cover letter to Peabody omits this language and instead indicates that the Dodge decision was made based upon "reports and recommendations from the Bureau's Navajo Area and Energy and Minerals Resources Office, the Bureau of Mines, and others." Peabody was not provided a copy of the Dodge cover letter to the Navajo Nation Chairman. The Navajo Nation Chairman was, however, furnished a copy of the BIA's cover letter to Peabody.

During discovery in this case, Donald Dodge was asked about his role in making this decision. Dodge testified that he was not told where the twenty percent figure came from, and did not know who had recommended the decision other than a subordinate who presented the decisional document for his signature. (Dodge Dep. 36-44).

Peabody promptly sought administrative review of the Area Director's decision and made clear that it would challenge both the timeliness of the rate adjustment and the accuracy of the flawed studies upon which it was allegedly based. These studies were based upon flawed assumptions about mining profitability, including the complete failure to account for tribal taxation.[7] Moreover, under applicable precedent, an untimely royalty rate adjustment was legally invalid. *See, e.g., Rosebud Coal Sales Company v. Andrus*, 667 F.2d 949 (10th Cir. 1982) (failure to give timely notice of coal lease readjustment renders adjustment invalid). *See also*, 43 C.F.R.

[7] Because the Dodge rate decision was made in consultation with the Navajo Nation Minerals Department, the Navajo Nation had copies of the reports upon which it was allegedly based, but Peabody did not. DPF 30-31; DA 132; I-PA 287. After the Dodge decision, Peabody initiated Freedom of Information Act requests to obtain these reports from the Interior Department.

§ 3451.1(c)(1) (failure to give timely notice of adjustment to federal coal lease waives right to readjust).

If the Navajo Nation were to litigate these issues, it faced the prospect of losing any royalty adjustment on North Lease coal coupled with the loss of the opportunity to negotiate a rate reopening on the South Lease. Almost immediately after the Dodge rate determination of June 1984, the Navajo Nation Chairman proposed to Peabody that the royalty rate be adjusted to 12.5% on both leases.

C. Peabody Seeks Administrative Review of the 1984 Dodge Rate Determination.

The Dodge rate determination was presented to Peabody as a fait accompli. On July 16, 1984, Peabody sought administrative review of the Dodge rate within the Interior Department. In turn, the Navajo Nation also sought administrative review of that aspect of the Dodge ruling concluding that the lease effective date was August 28, 1964, and also affirmatively sought to cancel the lease in the event the Dodge rate was not upheld. Navajo Nation Summary Judgment Brief, at 11.

In 1984, the applicable Interior Department regulations provided two different tracks for securing administrative review of an Area Director's decision. The method both Peabody and the Navajo Nation invoked was administrative review by the Indian Commissioner pursuant to 25 C.F.R. § 2.19 (1984).[8] Peabody sought such review on July 16, 1984, and thereafter filed briefs challenging the merits and timeliness of the Dodge rate determination.

The second available track was to seek an administrative adjudication by the Board of Indian Appeals. This track is formal in the sense that it is governed by separate regulations providing for discovery rights, hearings, and

[8] At the time, Deputy Assistant Secretary Fritz was substituting for the Indian Commissioner because of a vacancy at the position.

other procedures common to formal adjudication proceedings, including an express prohibition on ex parte communications with the Board. 43 C.F.R. § 4.27(b). Neither party ever sought review of the Dodge rate determination by the Board of Indian Appeals.

Under 25 C.F.R. § 2.19(b) (1984), a matter which is fully briefed, but still pending before the Indian Commissioner after thirty (30) days becomes amenable to the jurisdiction of the Board of Indian Appeals. Under applicable agency precedent, after the expiration of this thirty-day period, any party can invoke the jurisdiction of the Board of Indian Appeals by filing a notice of appeal or by moving the Board to assume jurisdiction. *Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary-Indian Affairs*, 11 IBIA 146, 153 (April 4, 1983). Once the Board of Indian Appeals takes jurisdiction over an unresolved matter presented initially to the Indian Commissioner, however, the Indian Commissioner is divested of jurisdiction over the matter. *Interim Ad Hoc Comm. of the Karok Tribe v. Area Director, Bureau of Indian Affairs*, 13 IBIA 76, 84 (January 8, 1985) (noting that this was declared policy of the Department for a considerable period of time).[9]

The last brief was submitted to Acting Indian Commissioner (Deputy Assistant Secretary Fritz) on January 30, 1985, and hence the matter could have been transferred to the Board of Indian Appeals on or after March 2, 1985. Neither party so requested. The Navajo Nation was aware of its rights in this regard, as its counsel sent a letter dated February 25, 1985 to Deputy Assistant Secretary Fritz pointing out that, under the regulation, he was required to issue a decision by March 2, 1985, thirty days after the filing of the last brief.

[9] Under applicable regulations, the Interior Secretary had the authority to assume direct responsibility for matters pending before either the Indian Commissioner or the Board of Indian Appeals. 43 C.F.R. § 4.5.

On July 5, 1985, Peabody sent a letter to newly appointed Interior Secretary Hodel, with a copy to the Navajo Nation, urging the Secretary to postpone resolution of the administrative proceedings in favor of a voluntary settlement by the parties. Subsequently in July 1985, a consultant, retained by Peabody at the suggestion of Southern California Edison[10] and known to Secretary Hodel, met directly with Secretary Hodel to ask that any ruling be deferred to allow the parties to complete ongoing settlement negotiations. Shortly thereafter, Secretary Hodel sent a memorandum to Deputy Assistant Secretary Fritz, a draft of which was prepared by Peabody, urging that a hasty decision not be made and that the settlement negotiations be promoted.

In response to the letters of the Navajo Nation and Peabody about the status of the administrative review process, on August 29, 1985, the Interior Department accurately informed the parties by letter that:

> As you are aware the briefing schedule has been completed and a decision on the appeal is currently being considered by the Deputy Assistant Secretary – Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but the decision has not yet been finalized.

Navajo Nation v. United States, 46 Fed. Cl. 217, 223 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

This letter placed the Navajo Nation on notice that the briefing process was complete and that Deputy Assistant Secretary Fritz had reached no decision. If the Navajo Nation had wanted to invoke the jurisdiction and adjudicatory processes of the Board of Indian Appeals, it could

[10] Southern California Edison ("SCE") was the operator of the Mohave Generating Station, a customer of Navajo Nation coal, and it had also sought administrative review of the Dodge rate ruling.

have done so. Instead, as the Court of Federal Claims noted, upon receipt of this letter, the Navajo Nation resumed negotiations with Peabody, and the parties reached a tentative settlement within a month adopting the 12.5% royalty rate for both the North and South Leases. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 223 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

D. The Parties Enter Into a Settlement Agreement and Lease Amendments in 1987.

Because of an intervening change in Navajo Nation administration, the tentative settlement was not finalized until November 1987. 46 Fed. Cl. at 224. At that time, the parties executed the 1987 Lease Amendments which provided substantially increased financial benefits for the Navajo Nation, including: a 12.5% royalty rate for the coal mined on the South Lease;[11] retroactive royalty payments back to February 1, 1984; recognition of an additional tribal tax of up to 8% on coal sold; a large increase in water payments from $5 to $150 per acre-foot; new Navajo scholarships; and additional coal bonus provisions. [JA 281, 287, 291, 292, 295, 299] As noted by the Court of Federal Claims, the new agreement "permit[ted] the tribe to realize as much as 20.5 percent yield in royalties and taxes combined." 46 Fed. Cl. at 224. Moreover, as the Court of Federal Claims accurately observed, "the agreement obviated a long, costly, and uncertain legal challenge by Peabody." 46 Fed. Cl. at 224. The Navajo Nation thereafter sought and obtained Secretary Hodel's approval of the 1987 Lease Amendments.

[11] Because the Navajo Nation held an undivided one-half joint interest with the Hopi Tribe on South Lease coal, the Navajo Nation's royalties on its interest in South Lease coal was increased to 6.25%, for an overall royalty rate of 12.5%.

The 1987 Lease Amendments expressly acknowledged that the parties had a dispute as to the validity and reasonableness of the Dodge rate determination [JA 286] (1987 Lease Amendments, ¶ 4); that in consideration of the new lease benefits, the Navajo Nation agreed jointly to move the Secretary to vacate the Dodge rate determination and "render that royalty adjustment decision to be without legal force or effect" (*id.*); and that the Navajo Nation recognized the 1987 Lease Amendments are "valid and enforceable and in the best interests of Lessee and Lessor and its people." [JA 308] (1987 Lease Amendments, ¶ 13).

E. The Navajo Nation Reaffirms the 12.5% Royalty Rate as the Equitable Rate in 1998 and Then Seeks and Obtains Secretarial Approval of This Rate.

The 1987 Lease Amendments provided that the royalty rates on both leases would automatically continue at the 12.5% rate after ten years, unless one of the parties expressed dissatisfaction with this rate, at which time the parties could obtain an adjustment by negotiation or by binding arbitration setting the "equitable royalty rate, considering the interests of Lessor, Lessee, and the Navajo and Mohave Participants." [JA 283] (1987 Amendments, ¶ 3). During 1997 and 1998, the Navajo Nation sought a royalty rate increase first by negotiation and then by arbitration in Arizona.

In September 1998, the Navajo Nation and Peabody agreed to a new set of lease amendments in settlement of the royalty rate arbitration proceedings initiated by the Navajo Nation. Pursuant to the 1998 arbitration settlement agreement, the parties submitted a stipulated final arbitration award to the arbitration panel continuing the royalty rate of 12.5% at least through December 2007, which the arbitrators adopted as their final arbitration award. Also pursuant to the 1998 arbitration settlement

agreement, the parties executed the 1998 Lease Amendments which continued the 12.5% royalty rate, and reaffirmed all other unmodified terms of the leases.

Pursuant to the terms of the 1998 arbitration settlement agreement, the Navajo Nation submitted the 1998 Lease Amendments to Interior Secretary Babbitt for his recommended approval under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a ("IMLA"). In March 1999, Interior Secretary Babbitt approved the 12.5% royalty rate contained in the 1998 Lease Amendments as being in the best interest of the Navajo Nation under the IMLA.[12] [L006-07] More specifically, Secretary Babbitt pointed out that under the applicable Interior Department regulations (promulgated in 1996), the Interior Secretary did not have to determine whether this rate was in the "best interest" of the Navajo Nation because it met the 12.5% royalty rate requirement of 25 C.F.R. § 211.43(a). [L006] Nonetheless, Secretary Babbitt directed the Interior Department to conduct an economic analysis and review of the lease amendments and, on the basis of that analysis and review, determined that they were in the best interest of the Navajo Nation under IMLA. [L006]

Notwithstanding the Navajo Nation's agreement in 1998 to a 12.5% royalty rate under the leases, its subsequent application for Secretarial approval of this rate, and its successful demand for millions of dollars in bonus payments under the lease amendments, the Navajo Nation initiated secret litigation against Peabody in the United States District Court for the District of Columbia in February 1999, alleging that the lease royalty rates should be retroactively reformed to the 20% rate set by BIA Area

[12] Peabody has lodged with this Court a copy of Secretary Babbitt's March 29, 1999 decision approving the 12.5% royalty rate as satisfying both IMLA and implementing regulations. 25 U.S.C. § 639a; 25 C.F.R. § 221.43(a). [L004-07]

Director Dodge in 1984.[13] As the District Court has since noted, however, the Dodge rate was a "unilateral[]" adjustment that "was in excess of the 12.5% and lesser rates applied in other coal leases during the period of 1985 to 1996." *Navajo Nation v. Peabody Holding Co., Inc.*, __ F. Supp.2d __, 2002 WL 1457121 (D.D.C. June 24, 2002).[14] In fact, the Navajo Nation's two coal leases with other companies also have a 12.5% royalty rate. [L003]

F. The Navajo Nation Sues the Interior Department in the Court of Federal Claims.

In 1993, the Navajo Nation brought a two-count complaint against the Interior Department in the Court of Federal Claims alleging that the Interior Secretary had breached trust and contract obligations during the rate adjustment process in the 1980s. In December 1997, the Navajo Nation sought summary judgment, alleging that the Interior Secretary had breached his trust obligations by engaging in a prohibited ex parte conversation with Peabody's consultant in July 1985.

In February 2000, the Court of Federal Claims dismissed the Navajo Nation's suit for lack of jurisdiction because the Navajo Nation had not established a breach by the Secretary of any trust obligation that could give rise to a duty to pay money damages. *Navajo Nation v. United*

[13] The Navajo Nation's original complaint was filed under seal in February 1999, but it was never served upon Peabody or the other defendants. On June 25, 1999, the Navajo Nation filed an amended complaint asserting a civil RICO claim under 18 U.S.C. § 1964(c) and served this public complaint upon Peabody.

[14] In making this assertion, the District Court relied upon an unrebutted expert report submitted by Peabody which indicated that, without exception, all of the 471 federal, state, and tribal coal leases in the West used rates of 12.5% or less during the period from 1988 to 1996. Excerpts from this document have been lodged with this Court. [L001-03]

States, 46 Fed. Cl. 217, 229 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

The Court of Federal Claims examined the Secretary's duties under the IMLA, 25 U.S.C. § 396, and its implementing regulations, 25 C.F.R. § 211, and concluded that they did not impose a sufficient degree of managerial responsibility upon the Interior Secretary over Navajo Nation coal leasing as to create a duty that could provide the foundation for money damages under this Court's holding in *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). 46 Fed. Cl. at 233. In the Court of Federal Claims, the Navajo Nation noted that, as a policy matter, the Secretary would not approve coal leases with royalty rates less than those the federal government "would receive for its own coal – at that time and now, apparently, 12.5%" *Id.* The court observed that the 1987 Lease Amendments therefore did not run afoul of that Interior Department policy. *Id.*

Despite its finding of no jurisdiction based upon the lack of a statutory or regulatory duty, the Court of Federal Claims went on to examine whether Secretary Hodel had breached a common law duty to the Indians because of the alleged ex parte meeting with Mr. Hulett in July 1985. While acknowledging that the Secretary's duties are not equivalent to those of a common law trustee, the Court of Federal Claims concluded that Secretary Hodel had violated a trustee's common law duty by engaging in an alleged prohibited ex parte communication. The Court of Federal Claims suggested, without elaboration, that the Navajo Nation's alleged lack of information about Peabody's communication with the Secretary would have harmed them in their negotiations.[15] In any event, the

[15] A more logical inference, however, is that the Navajo Nation would have negotiated from what it perceived as a stronger position if it truly labored under the misimpression that a favorable decision by the Secretary was imminent. The fact that the Navajo Nation agreed to a 12.5% royalty rate under these circumstances supports the conclusion

(Continued on following page)

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Court of Federal Claims held that any common law duty regarding ex parte communications, and its alleged breach by the Secretary, did not create a duty for which money damages could be awarded. 46 Fed. Cl. at 227.

The Federal Circuit reversed, holding that the IMLA imposes a statutory duty to manage the Navajo Nation's mineral assets "in a manner that maximizes their benefit to the Indians." The Federal Circuit did not identify any breach of a specific statutory or regulatory duty. In particular, the court did not hold that the 12.5% royalty obtained by the Navajo Nation violated any statutory directive under the IMLA, and such a holding could not have been made given the undisputed evidence that this was the universally applicable rate, even for federal coal.

Nor did the Federal Circuit address the uncontradicted evidence establishing that there was no misconduct and no harm to the Navajo Nation. Indeed, the court misstated the nature of the proceedings below. For example, the original opinion stated that, "[b]y suppressing the royalty decision of the Interior's Board of Indian Appeals, the Secretary acted in direct contravention of the Act's charge to the Secretary to obtain for the Indians the maximum return for their minerals." Slip opinion, at *6. The Federal Circuit was mistaken: there was no proceeding before the Board of Indian Appeals, much less a decision by that administrative body. The Court thereafter corrected its opinion to conclude that the Secretary's breach was in "suppressing the decision of the Deputy Assistant Secretary for Indian Affairs." *Navajo Nation v. United States*, 263 F.3d 1325, 1332 (Fed. Cir. 2001). Likewise, however, there was never any decision of the Deputy Assistant Secretary for Indian Affairs, as he confirmed in his uncontradicted deposition testimony.

that this rate, along with the other elements of the negotiations, was deemed beneficial by the Navajo Nation.

In a concurring and dissenting opinion, Judge Schall acknowledged that the Secretary has general fiduciary obligations, but concluded that this Court's precedent required more than this – that the court must "find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship." 263 F.3d at 1339. The dissenting opinion concluded that no such specific fiduciary responsibility was created by the statutes and regulations cited by the majority opinion regarding the Secretary's actions during the administrative review process.

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals should be reversed and the case dismissed for lack of jurisdiction because the Secretary did not violate any specific statutory or regulatory duty established pursuant to the IMLA or the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The undisputed record demonstrates that there was no breach of any duty, nor (as a matter of law) could the Navajo Nation have possibly been harmed.

The Secretary did not breach any procedural duty to the Navajo Nation. No statute or regulation, under either IMLA or the APA, prohibited the Secretary from meeting privately with Peabody during the informal administrative review. In fact, the Navajo Nation understood that ex parte contacts were perfectly permissible during the rate readjustment process, and it is undisputed that the Navajo Nation itself engaged in numerous such ex parte contacts with Interior Department officials. Under *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), federal courts may not impose procedural requirements on administrative agencies beyond those set forth in the applicable statute and regulations. That principle is especially salient here, because Peabody's right to contact the Secretary was protected by the First Amendment and cannot provide a basis for civil damages.

Nor is there any merit to the Navajo Nation's claim that the Interior Department breached its fiduciary duty because the Secretary supposedly "scuttled" a final decision by the Indian Commissioner. It is undisputed that the Commissioner had not made a decision. Even if he had, the Secretary would not have breached any duty by overruling it. Further, there could not have been a breach, as a matter of law, because the Navajo Nation failed to exhaust administrative remedies available to it. These remedies could have addressed any procedural infirmities identified by the Navajo Nation.

The Court of Appeals also erred because the Secretary did not breach any substantive duty owed to the Navajo Nation under applicable statutes and regulations. It is undisputed that, between the years 1988 and 1996, none of the 471 federal, state, and Indian coal leases in the Western coal-producing states had a royalty rate higher than 12.5%.[16] The 1987 Lease Agreements provided the Navajo Nation not only with a 12.5% royalty rate, but also additional benefits, such as increased payments for water use, recognition of Navajo Nation taxation on coal, and an increased royalty rate on the South Lease, which did not provide for any royalty rate changes.

As recently as 1998 and 1999 the Navajo Nation again represented to the Interior Department that the 12.5% rate satisfied the IMLA and was in the "best interest" of the Navajo Nation. [L004] Any claim that the Interior Secretary is obliged to maximize Indian revenues is foreclosed by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989). Moreover, such a claim would represent a judicially imposed obligation not supportable by any specific statutory or regulatory duty and would therefore violate the separation of powers.

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[16] See Lodged Material at L002-03. Not only do the 471 Western coal leases from 1988 to 1996 all use the rate of 12.5% or less, public records reveal that this is also true for federal, state, and tribal coal leases dating back to 1985. [L003]

The Secretary does not have a broad fiduciary duty to manage all Indian mineral leases under the IMLA. The government is not to be treated as a common-law trustee. The Court of Appeals erred by holding that the Navajo Nation may assert a claim for breach of trust without identifying any specific statutory or regulatory duty.

ARGUMENT

Under this Court's precedent, to bring a damages suit, the Navajo Nation must demonstrate that the Interior Secretary violated a specific duty imposed by statute or regulation. In order to impose liability, the statutory scheme must *both* "establish a fiduciary relationship and define the contours of the United States fiduciary responsibilities." *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).[17] Thus, prior to the decision below, it was well established that the United States could be held liable only if it violated a specific fiduciary duty imposed by a statutory scheme. *See, e.g., Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996); *Pawnee v. United States*, 830 F.2d 187, 191-92 (Fed. Cir. 1987).[18] For this reason, "where no specific statutory requirement or regulation is alleged to have been breached by the Secretary, the money claim against the government must fail." *Brown*, 86 F.3d at 1563; *Pawnee*, 830 F.2d at 191-92.

In this case, the pertinent statute, IMLA, does not make the United States a fiduciary with full responsibility for the management and control of mineral resources for all Indian tribes. On the contrary, IMLA was purposely designed to promote tribal autonomy and economic

[17] A court is not free to "supplement" the statutory scheme. *Cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74-77 (1996).

[18] *Accord, Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[T]he government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations."). *See also Band of Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

independence. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1112-13 (9th Cir. 1981) (Congress intended to give Indians control over lease decisions). Thus, as the United States has demonstrated elsewhere,[19] the statute here is not comparable to the statute found sufficient to trigger such a duty in *Mitchell II*.

But, in any event, it is decisive here that no liability may be imposed unless plaintiff can demonstrate that the Secretary violated a specific statutory or regulatory duty. The Navajo Nation cannot satisfy that requirement.

A. The Secretary Did Not Breach Any Procedural Duty to the Navajo Nation.

The Secretary's conduct during the administrative review process did not run afoul of any procedural duty owed to the Navajo Nation under the informal administrative review process initiated by both Peabody and the Navajo Nation. There is no statute or regulation, under either IMLA or the APA, 5 U.S.C. § 706, that prohibited Secretary Hodel from meeting or talking separately with Peabody during the pendency of the informal administrative review process. Neither the Navajo Nation nor the Federal Circuit's majority opinion have identified any statute or regulation that prohibited the Interior Secretary from meeting separately with Peabody. Notably, the *formal* track of administrative review in the Board of Indian Appeals – which neither party in this case invoked – includes an express prohibition on ex parte communications. 43 C.F.R. § 4.27(b). The *informal* process elected by the parties in this case contained no such prohibition.

In fact, the Navajos understood that ex parte contacts were entirely permissible during the rate readjustment process. In an attempt to win a higher royalty rate in the spring of 1984, the Navajo Nation itself made a series of ex parte contacts with the Interior Department, the BIA, and

[19] *See* Pet. 16-23.

the BIA Area Director (Donald Dodge) without notice to Peabody. The Navajo Nation worked secretly with Dodge in adjusting the royalty rate, without any notice to Peabody.

It has been established for decades that federal courts may not impose procedural requirements on administrative agencies beyond those set forth in the applicable statute and regulations. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990) ("*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies procedural requirements that have no basis in the APA;" applying *Vermont Yankee* to informal agency adjudication); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); *District No. 1, Marine Eng'rs' Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000). This Court has repeatedly held that administrative agencies have discretion to be flexible in the administration of their own procedural rules. *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970).

Vermont Yankee made clear that a court's duty in reviewing agency procedures is simply to determine whether the agency has complied with the applicable statutes and regulations, not to impose special procedural requirements on the agency based on the court's own notions of what procedures would be most desirable. 435 U.S. at 549. Following *Vermont Yankee*, courts have held that, absent an express statutory prohibition on ex parte contacts with an agency decisionmaker, agencies are free to make decisions through such contacts. *District No. 1 Marine Eng'rs' Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000).[20] "Generally, *ex parte*

[20] *See also Portland Audubon Soc'y. v. Endangered Species Comm.*, 984 F.2d 1534, 1540-42 (9th Cir. 1993); *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (post-comment, ex parte meetings do not

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contact is not shunned in the administrative agency arena as it is in the judicial context." *Texas Office of Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1537 (2002). Indeed, "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility and amenability of these officials to the" public. *Id.* (citations and quotations omitted).

No statute or regulation prohibited contact with the decisionmakers on the informal track. The IMLA does not address – and therefore does not preclude – ex parte contacts. The more general framework of the APA does not prohibit ex parte contacts under the circumstances presented here. Congress specifically limited the APA prohibition on ex parte contacts to agency proceedings in which the governing statute requires a hearing "on the record." *See* 5 U.S.C. §§ 557(a), (d)(1); H.R. Rep. No. 880, at 19, *reprinted in* 1976 U.S.S.C.A.N. 2201. None of the applicable IMLA sections provides for hearings on the record; hence none of the proceedings under those sections is subject to the APA's ban on ex parte communications.[21] *See*

invalidate rulemaking in absence of statute barring such communications); *Marketing Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1309 (D.C. Cir. 1977) (ex parte communications in informal notice and comment rulemaking not barred by APA); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1048 (N.D. Calif. 1993); *See generally* Davis & Pierce, Administrative Law Treatise § 7.6, at 480 (4th ed. 2002) ("[E]x parte communications are highly desirable, and perhaps even constitutionally protected, in context of a rulemaking to resolve a policy issue.").

[21] However characterized, the administrative process employed by Deputy Assistant Secretary Fritz was not a formal adjudication. Section 554 of the APA provides that formal adjudications – to which the ex parte prohibitions of section 557 apply – are limited to adjudications "required by statute to be determined on the record after an opportunity for an agency hearing." Here, no hearing rights were provided by statute to Peabody, and no hearing rights were afforded to Peabody by the Interior Department. Internal Interior Department documents suggest that the Department considered providing hearing rights, including by means of a referral to the Board of Indian Appeals for

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Maritime Admin., 215 F.3d at 42 (citing *Vermont Yankee*); Davis & Pierce, Administrative Law Treatise § 8.4, at 543 (4th ed. 2002) ("The APA prohibitions on ex parte communications do not apply . . . to informal adjudications."). Similarly, no regulation bars ex parte contacts in proceedings before the Indian Commissioner.[22]

Here, when no statute or regulation addressing approval of Indian mineral leases prohibits Secretarial communications with interested outsiders such as Peabody, courts should be especially reluctant to impose new procedures post-hoc. Further, the Secretary's actions here, though taken pursuant to contract, were more in the nature of legislative acts rather than adjudicatory in character,[23] and the First Amendment's Speech and Petition Clauses protect the rights of citizens to lobby government officials engaged in such legislative functions. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (referring to "lobbying" worthy of constitutional protection under the First Amendment"); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546

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appointment of an administrative law judge, but no such rights were ever afforded. Navajo Nation Exhibit 51. The Board of Indian Appeals is authorized to initiate hearings through the appointment of administrative law judges. 43 C.F.R. § 4.337(a).

[22] Under the regulations in place at the time, the Commissioner of Indian Affairs was required to record only what he relied upon, and he could make use of "any information available to [him] . . . *whether formally part of the record or not*. . . ." 25 C.F.R. § 2.20 (1984) (emphasis added).

[23] *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 (1994) ("Rate-making is essentially a legislative function") (quoting *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945)); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 371 (1989) (because "ratemaking is an essentially legislative act," "the Council's proceedings here were plainly legislative"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989) ("The rate-making power is a legislative power and necessarily implies a range of legislative discretion.") (quoting *Simpson v. Shepard*, 230 U.S. 352, 433 (1913) (*Minnesota Rate Cases*)).

(1983) (treating lobbying as an exercise of "First Amendment rights"); *Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) ("the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives").

The Navajo Nation's additional contention – that Interior breached its fiduciary duty because the Secretary intervened in the decisionmaking process and supposedly "scuttled" a final decision by the Commissioner – is equally without merit. There was no "decision" to suppress because no *decision* had been made. The draft decision had not yet been signed or forwarded to the parties by certified or registered mail. *See* 25 C.F.R. § 2.19 (1984) ("Commissioner's written decision in each case shall be forwarded to each known interested party by certified or registered mail, return receipt requested"). Indeed, under the applicable agency regulations, there never was a final decision that could be the subject of judicial review. 43 C.F.R. § 4.21(b) (requiring exhaustion of administrative remedies, and declaring non-final and not subject to judicial review any decision which was subject to appeal to Board of Indian Appeals). The unexecuted, draft document that was under consideration by Assistant Secretary Fritz was no more an agency decision than any other draft circulating before a subordinate agency official.

Traditional administrative law principles permit the head of a department to preempt or direct action by his subordinates as long as the regulations do not expressly deprive him of that discretion. *See Knight v. United Land Ass'n*, 142 U.S. 161, 176-82 (1891) ("As a general proposition of administrative agency law, the head of [the Interior Department] has the power to review and revise acts of subordinates where, as here, the powers in question are vested in the subordinate under the supervision and direction of the superior or the power to administer is

vested in the superior.").[24] Here, no Interior Department regulation prohibited the Secretary from exercising his authority in this case.[25]

In any event, the Secretary did not violate any specific statute or regulation in suggesting a delay in the proceeding in the expectation that the parties would settle the dispute. Just as there is a federal judicial policy promoting the settlement of complex litigation,[26] agencies are free to promote private resolution of complex disputes, especially when only one aspect of a complex multi-party dispute is before the agency. Here, for example, the Secretary also had responsibilities to the Hopi Tribe, and the voluntary increase of the royalty rate on the joint use coal of the South Lease through negotiations – a matter over which the Secretary had no administrative authority – would redound to the benefit of both the Navajo Nation and the Hopi Tribe. This and other complex issues, including tribal taxation and water use rights, were at issue in these multiparty negotiations, and they were ultimately resolved by negotiation.

The absence of a more elaborate explanation about the Secretary's action likewise did not constitute a breach of a

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[24] *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) ("intra-Executive Branch meetings . . . and the failure to docket one such meeting involving the President" did not violate APA or due process); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1385-89 (5th Cir. 1979); *See also* Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.9, at 685 (4th ed. 2002) ("ultimate decisionmaking power [is] held by the agency head").

[25] To the contrary, the regulations in place at the time expressly reserved to the Secretary the "authority to review any decision of [any] Department employee." *See* 43 C.F.R. § 4.5(a)(2) (1985); *see also* 43 C.F.R. § 4.5(a)(1) (1985) (Secretary has "authority to take jurisdiction at any stage of any case before any [Department] employee"). These regulations plainly embrace the lesser step of deferring a decision in favor of settlement negotiations.

[26] *See, e.g.*, *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) ("it is axiomatic that the law encourages settlement of disputes").

specific fiduciary duty under the regulations. There is nothing in the regulations or in other administrative law principles that requires an agency to disclose its internal deliberations prior to rendering a final decision. Indeed, this Court has specifically rejected the contention that an agency engaged in an informal action such as this one is required to disclose its intentions so as to glean comment from the affected parties. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990). Any rule requiring the parties to be informed of the reasons for an agency's delay in reaching a final decision would wreak havoc with the administrative process. Since the Department of Interior regulations did not require any disclosure of the Secretary's action, there was no breach of a specific duty here.

In addition, there could not have been a breach, as a matter of law, because the Navajo Nation failed to avail itself of alternative remedies provided by the administrative scheme. If the Navajo Nation had been dissatisfied with the lack of progress in concluding the Commissioner's informal review, or if the Navajo Nation had been unhappy with any resulting decision, it could have elected to invoke a more formal process – an appeal directly to the Board of Indian Appeals under 25 C.F.R. § 2.19(b). In addition, the APA provides that any party aggrieved by unreasonable agency delay can seek judicial relief in federal court. 5 U.S.C. § 706(1). It is undisputed that the Navajo Nation did not invoke either remedy in this case, even though it considered taking action to force a decision. [JA 361] Evidently the Navajo Nation did not want to subject the Dodge rate to the formal adjudicatory process of the Board of Indian Appeals, including the prospect of hearings before an administrative law judge focusing on the reliability of the reports upon which the decision was ostensibly based. 43 C.F.R. §§ 4.337 & 4.338 (describing hearing procedures).

Whatever the motivation for the Nation's strategy, its failure to exhaust its administrative remedies means that it cannot identify any breach of a procedural duty or any harm. The relevant regulations specifically require the exhaustion of administrative remedies as a precondition to obtaining judicial review. 43 C.F.R. § 4.21(b). "This Court

long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). Moreover, the administrative remedies shunned by the Navajo Nation would have addressed any previous infirmities in the process afforded the Navajo Nation. *See, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981) (post-deprivation remedy eliminates any procedural due process claim).

Hence, the Navajo Nation cannot identify any breach of a specific procedural duty. Nor can the Navajo Nation identify any resulting harm.

B. The Secretary Did Not Breach Any Substantive Duty Owed the Navajo Nation By Statute or Regulation.

The Navajo Nation has also been unable to identify any violations of the applicable regulations governing Secretarial approval of lease royalty rates. (25 C.F.R. Part 211, *et seq.* (1985)). From 1985 through 1996, all of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states had royalty rates of 12.5% or lower.[27] None had a royalty rate higher than 12.5%. The 1987 Lease Agreements were thus as favorable as any comparable lease, and also provided additional benefits to the Navajo Nation, including: increased payments for water use; recognition of Navajo Nation taxation on coal; and increasing the royalty rate on the South Lease which did not provide for any royalty rate changes.

In fact, in 1998 the Navajo Nation *again* sought Secretarial approval of a 12.5% royalty rate for the leases. [L004] The Navajo Nation represented to the Secretary that the 12.5% rate satisfied the IMLA and was in the

[27] *See* Lodged Material, at L003.

"best interest" of the Navajo Nation. In 1999, Interior Secretary Babbitt approved this same royalty 12.5% royalty rate – again at the urging of the Navajo Nation – as satisfactory under the IMLA because Interior Department regulations promulgated in 1996 provided that a 12.5% royalty rate for *any Indian mineral lease* satisfied the IMLA and therefore did not require Secretarial approval. [L006]

The Navajo Nation suggests that the IMLA imposes a duty upon the Secretary to maximize Indian mineral lease revenues, and that this duty was allegedly breached by either the Secretary's failure to impose the 20% royalty rate initially selected by Area Director Dodge or the Secretary's approval of the 12.5% rate to which the Navajo Nation independently agreed in 1987.

Yet this Court has flatly rejected the Navajos' legal theory. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989). In the *Cotton* case, this Court traced the lineage of the alleged "broad congressional policy of maximizing revenues for Indian tribes," to a Secretarial letter attached to the congressional reports in the Act's legislative history. *Id.* This Court held that, upon closer examination, the statute contained no such policy of maximizing revenues: "[R]ead in the broadest terms possible, the relevant paragraph suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Id.* (quoting from S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3rd Sess. 2 (1938)). This Court found "no evidence" for the supposition "that Congress intended to remove all barriers to profit maximization." *Id.* at 180. Indeed, this Court held that it would be "unfathomable" to accord the statute such an interpretation. *Id.* at 179.

The Navajo Nation acknowledges that the Secretary, as a policy matter, would not approve coal leases with royalty rates less than those the federal government "would receive for its own coal – at that time and now, apparently, 12.5%," *Navajo Nation v. United States*, 46

Fed. Cl. 217, 229 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002). The Court of Federal Claims properly concluded that the 1987 Lease Amendments did not run afoul of that Interior Department policy. *Id.*

Thus, the Navajo Nation cannot allege – and has not alleged – that the lease's 12.5% royalty rate burdened the Nation with "'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Cotton*, 490 U.S. at 179. Indeed, as the District Court for the District of Columbia recently observed, the 12.5% royalty rate was the highest applicable to coal leases from 1985 to 1996. *Navajo Nation v. Peabody Holding Co., Inc.*, 2002 WL 1457121.

Rather than identify – let alone examine – the governing statutory or regulatory duties, the courts below embarked on their own development of common law duties for the agency. Both the Court of Federal Claims and the Federal Circuit sought to build common law duties applicable to administrative agencies from common law sources. The imposition of requirements for particular procedures cannot be justified here by reference to the common law of fiduciary duties. While the government is in a fiduciary relationship with the Navajo Nation, the fact of this relationship cannot justify a court imposing requirements on agencies beyond those imposed by Congress. It is not the judiciary but Congress, pursuant to its exclusive authority over Indian affairs, U.S. Constitution Art. I, § 8, cl. 3 (Indian Commerce Clause); *United States v. Kagama*, 118 U.S. 375, 383-384 (1886), that defines the duties of the Interior Department when it carries out delegated functions.[28] With the exception of the majority

[28] This Court has repeatedly stated that Congress has plenary authority over Indian affairs. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 57

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opinion below, every court that has addressed the issue has held that compliance with the governing statutory provisions equates with compliance with the fiduciary duty.[29] As one court explained, "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998). *Cf. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15-16 (2001).

This Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). The courts are therefore not free to supplement Congress' scheme by imposing additional, judicially created duties that Interior must follow when approving the lease.[30] "[T]he task of the federal courts is to

(1946); *see also* F. Cohen, Handbook of Federal Indian Law, 207-212 (1982 ed.).

[29] *See Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 929-30 (10th Cir. 1994) (affirming district court's ruling that "no breach of fiduciary duty had occurred because the government had enforced all applicable statutes and regulations"); *North Slope Borough v. Andrus*, 642 F.2d 589, 593, 611-13 (D.C. Cir. 1980) (Interior complied with its statutory duties and the common law of fiduciaries cannot justify imposition of additional duties); *California v. Watt*, 668 F.2d 1290, 1325 (D.C. Cir. 1981); *Cobell v. Babbitt*, 91 F. Supp.2d 1, 30 (D.D.C. 1999) ("plaintiffs must point to rights granted by statute if they are to be enforced against the government."); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1487-89 (D. Ariz. 1990), *aff'd sub. nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied sub. nom Havasupai Tribe v. United States*, 503 U.S. 959 (1992).

[30] *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 317 & n.9 (1981) (recognizing preexisting federal common law rules are subject to displacement by congressional entry into a

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interpret and apply statutory law, not create common law." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981); *see also Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). Indeed, the extra-statutory, common law fiduciary duties announced by the Court of Appeals have an almost limitless potential for justifying judicial second guessing of Executive Branch decisionmaking affecting Indians, a judicial role that is inconsistent with separation-of-powers principles.

In sum, the Federal Circuit fundamentally misapprehended the nature of the fiduciary relationship between the federal government and the Navajo Nation. In this setting, Congress has chosen to implement its view of the contours of that relationship by confining the Secretary's role to one of approving the lease. The extra-statutory duties announced by the Court of Appeals find no support in this Court's cases, and they have been rejected by the other lower federal courts who have addressed the issue.

CONCLUSION

For the foregoing reasons, the decision of the Federal Circuit should be reversed, and the case should be dismissed for lack of jurisdiction.

Respectfully submitted,

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particular field); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("courts are not free to 'supplement' Congress' answer").